3-27-2014

HFLP v. City of Twin Falls Appellant's Reply Brief Dckt. 41277

IN THE SUPREME COURT OF THE STATE OF IDAHO

H. F. L. P., LLC	)	
	)	
Appellant,	)	Docket No. 41277
	)	
vs.	)	
	)	
CITY OF TWIN FALLS,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

HON. G. RICHARD BEVAN, District Judge presiding

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TABLE OF CONTENTS

Table of Authorities ..... ii, iii

Introduction 1

Standards of Review. 2

Argument and Authorities 2

Issue I. **Respondent's reliance on the 20-year period is erroneous the proper as a matter of law and statutory prescriptive period was tried by consent** 2

Issue II. **The Court erroneously admitted the exhibits prepared by Lee Glaesmann.** . 6

Issue III. **The lower Court erroneously presumed that easement by necessity must be proved by clear and convincing evidence** 8

Conclusion 9

Certificate of Service 9

TABLE OF AUTHORITIES

AMPAT/Midwest, Inc. V Ill. Tool Works Inc., 896 F.2d 1035, 1045 (7th Cir. 1990) 6, 7

Blackburn, 992 F.2d at 670 6

Bracey v Herringa, 466 F.2d 702, 704-05 (7th Cir. 1972) 6, 7

Capstar Radio Operating Company v Lawrence, 153 Idaho 411, 283 P.3d 728 (2012)..... 1

Carney v Heinson, 133 Idao 275, 985 P.2d 1138, 1140 (1999) 2

Chen v Conway, 121 Idaho 1000, 1004-05, 829 P.2d 1349, 1353-54 (1992) 2

Davis v. Gowen, 83 Idaho 204, 360 P.2d 403, 407 (1961) 8

Echo Acceptance Corp. V Household Retail Servs., Inc., 267 F.3d 1068 1091 (10th Cir. 2001) .. 6

Hartwell Corp. V Smith, 107 Idaho 134, 689 P.2d 79 (Ct.App. 1984)..... 3

Hoffman v Palmer, 129 F.2d 976, 991 (2d Cir. 1942)(Frank, J.) 6, 7

Jordan v Binns, 712 F.3d 1123 (7th Cir. 2013) 6, 7

Leon v Penn Cent. Co., 428 F.2d 528, 530 (7th Cir. 1970) 7

Lust, 383 F.3d at 588 ..... 6, 7

Marshall v Blair, 130 Idaho 675, 946 P.2d 976 (1997) 2

Melendez-Diaz v Massachusetts, 557 U.S. 305, 321, 129 S.Ct 2527, 174 L.Ed. 2d 314 (2009) .. 6

O'Laughlin v Circle A Constr., 112 Idaho 1048, 1051, 739 P.2d 347, 350 (1987) 2

Palmer v Hoffman, 318 U.S. 109, 113-14, 63 S.Ct. 477, 87 L.Ed. 645 (1943) 6

Phillips Industries, Inc. V. Firkins, 112 Idaho 693, 827 P.2d 706, 711 (Ct.App. 1992) 8

Sana v Hawaiian Cruises, Ltd., 181 F.3d 1041, 1046(9th Cir. 1999)(same) 7

Scheerer v Hardee's Food Sys., Inc., 92 F.3d 702, 706-07 (8th Cir. 1996) 6

Steckleim v Montgomery, 98 Idaho 671, 570 P.2d 1359 (1977) 3

Timberlake Constr. Co. v. U.S. Fid. & Guar. Co., 71 F.3d 335, 342 (10th Cir. 1995) 6

United States v Ware, 247 F.2d 698, 700 (7th Cir. 1957) 6

I.R.C.P. Rule 15b. 2

I.R.E. 803(8) 6, 7

Tr. P. 13, L. 25 to p. 14, L. 18. 1

INTRODUCTION

The Respondent, Twin Falls City, has asserted that the Appellant raised "for the first time on appeal" that "the operative time period in this case is prior to 1961, and not after it." The Respondent has asserted that the statutory time period for prescriptive easements is twenty years based upon language in the Complaint and ignored the fact that, after the Complaint was filed, this Court rendered its ruling in *Capstar Radio Operating Co. v. Laurence*, 153 Idaho 411, 283 P.3d 728, (hereinafter *"Capstar III"*) which specifically provided that the 2006 amendment to Idaho Code section 5-203 did not apply to an easement by prescription acquired prior to that date, and in such cases the previous five year limit applies. (*Id.* at p. 742, fn. 2*)*. Counsel for the Plaintiff/Appellant (hereinafter "H.F.L.P.") thereafter briefed the issue to the District Court on or about November 19, 2012 and the Court recognized same at the onset of trial. Specifically, the colloquy between the Court and counsel in opening arguments stated:

> MR. WUTHRICH: –and I put it in the brief with regard to the time period–I'm not sure whether you've had one since the amendment in 2006. I'm assuming every court has dealt with that issue; but I don't know whether Your Honor has.
> THE COURT: I don't know that I have taken a case that has gone to conclusion and judgment involving that, but you certainly cite to the Capstar case; and that rationale, I think, was also applied in Bachman versus Lawrence. So if you are talking about the five-year window, then, I think we're operating under that as long as this arose before the amendment was made in 2006.
> MR. WUTHRICH: And that's the time period we'll be looking at. But I just wanted to make sure that Your Honor was aware of that issue. (Tr. p. 13, L. 25 to p. 14, L. 18.) [Emphasis added]

Therefore, the issue of the proper period of prescription was clearly addressed and raised before the District Court below. Respondent has premised most of its arguments on the erroneous assumption that the 20-year period applies, which would be a conclusion of law and not a finding of fact. This highlights the errors of law below and why the decision of the lower Court should be reversed.

STANDARDS OF REVIEW

Respondent cites the case of *Marshall v. Blair*, 130 Idaho 675, 946 P.2d 976 (1997), for the proposition that "[a] district court's decision that a claimant has established a private prescriptive easement presents entwined questions of law and fact," citing *Chen v. Conway*, 121 Idaho 1000, 1004-05, 829 P.2d 1349, 1353-54 (1992). Appellant agrees. While it is also true that if–and in this case that's a big IF–"a district court's findings of fact are supported by substantial and competent, although conflicting, evidence, this Court will not disturb those findings. *Marshall v. Blair, Id.* at 979. However, this Court also stated that, "[u]nlike our review of the district court's findings of fact, we exercise free review over the district court's conclusions of law." *Id. See also, O'Laughlin v. Circle A Constr.*, 112 Idaho 1048, 1051, 739 P.2d 347, 350 (1987); *Carney v. Heinson,* 133 Idaho 275, 985 P.2d 1138, 1140 (1999). In the present case, the Appellant has attacked both the sufficiency of the evidence to support various factual findings, and particularly the conclusions of law the District Court intertwined therefrom.

ARGUMENT AND AUTHORITIES

1. Respondent's reliance on the 20-year period is erroneous as a matter of law and the proper statutory prescriptive period was tried by consent.

Issues B, C and D of Respondent's brief are entirely premised upon the 20-year statutory period. However, despite having plead that in the 2011 Complaint, H.F.L.P. raised the 5-year statutory time limit in its Pre-Trial Memorandum of November 19, 2012, shortly after publication of the *Capstar III* case. *(See* pending Motion to Augment the Record, and Record at p. 3.) Moreover, as noted above, this issue was raised in opening arguments and never objected to by the Respondent. I.R.C.P. Rule 15(b) provides:

> **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action on defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. [Emphasis added]

H.F.L.P. acknowledges that its Complaint erroneously presumed 20-year period applied. However, when the law became clear in 2012, H.F.L.P. briefed the issue to both the Court and opposing counsel. At no time after filing that brief did the Respondent ever object or maintain that H.F.L.P.'s position was not the law. In fact, it could not have, because the Supreme Court had finally made it clear what the effect of the 2006 amendment was. Twin Falls City did not object at trial to the introduction of evidence pre-2006. In fact, Mr. Urie's entire testimony about the property starts in 1946 clear up until he and his family sold it to H.F.L.P.'s predecessors in 1992. Failure to amend the pleadings to include issues tried by the express or implied consent of the parties does not effect the result of the trial of those issues, and whether an issue has been tried with the consent of the parties is a decision within the trial court's discretion. *Watson v. Idaho Falls Consol. Hosps.*, 111 Idaho 44, 720 P.2d 632 (1986). Where evidence concerning a prescriptive easement came into the record without objection, it would invoke the provisions of the rule concerning issues tried by the express or implied consent of the parties and the issue was therefore before the court. *Steckleim v. Montgomery,* 98 Idaho 671, 570 P.2d 1359 (1977); *See also, Hartwell Corp. v. Smith,* 107 Idaho 134, 689 P.2d 79 (Ct.App. 1984) (Plaintiff's failure to cite the particular statute of limitations upon which

it relied as a defense to the counterclaim would normally result in waiver of that defense; however, where the evidence showed the statute of limitations issue was not only tried by consent, but it was actually conceded by the defendant to be valid, it should be deemed to be raised in the pleadings.)

In the present case, all parties and the Court were made aware of the statutory period issue post-*Capstar III*. Both the Court and the Respondent, Twin Falls City, tried the case premised thereupon. At no time during the trial did Twin Falls City either argue to the Court that the 20-year post-2006 amendment was the proper period or object to all of the evidence being pre-2006. It seems disingenuous to now raise the issue for the first time on appeal and simultaneously argue H.F.L.P. never raised the issue below.

In fact, the District Court recognized the statutory time period was five years in its conclusions of law. *See* Findings of Fact and Conclusions of Law, R. 46. The Court, however, erroneously seemed to confuse the issue when it stated:

> H.F.L.P. claims that the triggering date happened sometime before 2006 (when the Legislature modified the statutory period from five years to twenty years). However, the court cannot accept that conclusion because there is no evidence of the road being used by the Uries from 1986 to 1992. Based on the lack of direct proof of when the statutory period started and when it was satisfied, this element [statutory period of time] has not been satisfied. (R. 46)

The fact of the matter is that the evidence was put in the record at trial of when the prescriptive easement arose, i.e. clear back in 1950 through 1970, and that evidence came in without objection.[1] Because H.F.L.P. also presented evidence that the easement was continued to be used, and even recognized by Twin Falls City and others, does not defeat the validity of the easement. Idaho has not

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[1]Ironically, even if the 20-year period applied–and it does not as a matter of law–the facts still sustain a prescriptive easement over the non-BLM property subsequently acquired by Twin Falls City, because the Uries adversely used the easement from the 1940s through 1986.

yet imposed a prescriptive "look back period" over which adverse easements cannot be legitimized. The trial court below had great anguish over that fact, and stubbornly refused to acknowledge, that a prescriptive easement can be legitimized, even forty years after the fact.[2] These are erroneous conclusions of law and are freely reviewable by this Court.

As a matter of law, however, H.F.L.P. need have only shown five years of continuous, uninterrupted and adverse use in order to sustain its prescriptive easement, so long as that five years predated the 2006 amendment. The District Court's concern about the lack of evidence of continuous use from 1986 to 1992 is a complete red herring. Once established, the prescriptive easement becomes the property right of the adverse claimant without necessity of formal court action. This Court should make that perfectly clear to the lower courts, because the confusion exists, about whether an easement is valid inchoate or only after court adjudication. The nature of Idaho law and the history of prescriptive easements is that they are valid and binding property rights, even though they have not formally been litigated. The judicial policy behind this is clear. There is no sense in creating a quasi "snake river water adjudication" with respect to all the hundreds of thousands of long standing, clearly recognized, and well-honored prescriptive easements that exist in our fine State. The courts have enough easement claims arising by virtue of newly acquired, but disgruntled neighbors who will not recognize long standing practices, customs and easement rights of their predecessors. Enacting a rule that requires all easements be adjudicated even in the absence of dispute would unnecessarily flood the court with litigants.

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[2]It is also unclear whether the easement could be established years ago and persist until now, even though no recorded easement was granted and the land is now owned by a public entity. R. 47, fn. 13.

2. The Court erroneously admitted the exhibits prepared by Lee Glaesmann.

Twin Falls City relies on I.R.E. 803(8) to sustain the District Court's admission, over the objection of H.F.L.P., of the Glaesmann overlays and exhibits. However, that rule provides:

> **Public records and reports.** Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, of matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (A) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (B) investigative reports prepared by or for a government, public office or an agency when offered by it in a case in which it is a party; (C) factual findings offered by the government in criminal cases; (D) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case. [Emphasis added]

However, the documents in this case were admittedly prepared by Mr. Glaesmann, a Twin Falls City employee, for use in this litigation. As was stated in *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013):

> It is well established, though, that documents prepared in anticipation of litigation are not admissible under FRE 803(6). *See Palmer v. Hoffman*, 318 U.S. 109, 113-14, 63 S.Ct. 477, 87 L.Ed. 645 (1943); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321, 129 S.Ct. 2527, 174 L.Ed. 2d 314 (2009); *Lust*, 383 F.3d at 588; *Blackburn*, 992 F.2d at 670; *Bracey v. Herringa,* 466 F.2d 702, 704-05 (7th Cir. 1972); *United States v. Ware*, 247 F.2d 698, 700 (7th Cir. 1957); *Echo Acceptance Corp. v. Household Retail Servs., Inc.,* 267 F.3d 1068, 1091 (10th Cir. 2001); *Scheerer v. Hardee's Food Sys., Inc.,* 92 F.3d 702, 706-07 (8th Cir. 1996). Litigation generally is not a regularly conducted business activity. *AMPAT/Midwest, Inc. v. Ill. Tool Works Inc.,* 896 F.2d 1035, 1045 (7th Cir. 1990); *see Palmer*, 318 U.S. at 114, 63 S.Ct. 477 (accident report created by railroad employee after an accident was not a business record because its "primary utility [was] in litigating, not in railroading"); *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.,* 71 F.3d 335, 342 (10th Cir. 1995) ("It is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business."). And documents prepared with an eye toward litigation raise serious trustworthiness concerns because there is a strong incentive to deceive (namely, avoiding liability). *See Hoffman v. Palmer,* 129 F.2d

976, 991 (2d Cir. 1942) (Frank, J.) (Documents prepared for litigation are "dripping with motivations to misrepresent"), *aff'd*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; *Lust*, 383 F.3d at 588; *AMPAT/Midwest, Inc.*, 896 F.2d at 1045; *Bracey*, 466 F.2d at 704-05; *see also* Fed.R.Evld. 803(6) advisory committee's note ("Absence of routineness raises lack of motivation to be accurate."); *cf. Leon v. Penn Cent. Co.*, 428 F.2d 528, 530 (7th Cir. 1970) (accident report prepared in anticipation of litigation at defendant's behest was admissible where it was offered by plaintiff); *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1046 (9th Cir. 1999) (same).

The same principles that would preclude admission of evidence prepared in anticipation of litigation under the business records exception is equally applicable, if not more so, under the public records exception to the hearsay rule. First off, to qualify as a valid public record, the exhibit must be records, reports, statements, or data compilations. . .setting forth its regularly conducted and regularly recorded activities. Documents prepared in anticipation of litigation are neither regularly conducted nor regularly recorded, unless, of course, the public agency is engaged in full time litigation (such as an attorney general's office or prosecutor's office). *See e.g. Jordan v. Binns* at 1132 (admission of the crash report was not admissible under Rule 803(8), the public records exception to the hearsay rule).

Secondly, public records containing "matters observed pursuant to a duty imposed by law and as to which there was a duty to report" are admissible under the public records exception. Again, the documents in this case clearly fall outside of that category. Finally, "factual findings resulting from an investigation made pursuant to authority granted by law" are also deemed admissible public records (subject to certain specified exceptions set forth in Rule 803(8)). Mr. Glaesmann's charts and overlays failed to fall within the public records exception and are "dripping with motivations to misrepresent".

The lower Court erred in admitting these exhibits over the objection of H.F.L.P.

3. The lower Court erroneously presumed that easement by necessity must be proved by clear and convincing evidence.

The issue of the easement by necessity by and between the H.F.L.P. parcels was another issue tried by consent, if not clearly elucidated in the pleadings. However, the Court presumed that the burden of proof is the same as that for a prescriptive easement, wherein the Court stated, "The court believes the burden [for easement by necessity] would be the same as easement by prescription–that is, proving the easement by clear and convincing evidence. While the case law is scant on the subject, the two cases involving implied easements which speak to the burden of proof simply recite that the "burden of proof rests upon the person asserting it to show the existence of facts necessary to create by implication an easement appurtenant to his estate." *Phillips Industries, Inc. v. Firkins*, 112 Idaho 693, 827 P.2d 706, 711 (Ct.App. 1992); *See also, Davis v. Gowen*, 83 Idaho 204, 360 P.2d 403, 407 (1961).

Respondent's assertion that the burden was on H.F.L.P. to prove its implied easement case by clear and convincing evidence is misplaced. Easements by prescription are adverse and diminish the property rights of the subservient estate. Case law requires proving a prescriptive easement case by clear and convincing evidence. Easements by necessity or implied easements arise by a policy of implied consent, i.e. that at the time of severance of the unified parcel, the grantor must have intended a right of ingress and egress to the property, and accordingly, the easement is presumed to be within the contemplation of the parties. In this case, when Uries sold their property west of Rock Creek, segregated into different parcels, presumably they did not intend to land lock any of the buyers. While easements by necessity are not necessarily favored, the policy of making the burden of proof greater than in ordinary cases is not justified. H.F.L.P. sufficiently proved it was entitled to

an easement by and between Parcels 3 and 2 of its property, across property recently acquired by the City as an easement by necessity.

CONCLUSION

For the foregoing reasons the Court should reverse and remand the matter to the trial court directing an easement by necessity by and between Parcels 3 and 2, and an easement by prescription across all of Twin Falls City property leading to the H.F.L.P. property, save and except only across the former BLM parcel. As regards that parcel, the Court should set aside the judgment of the State Court as being beyond the jurisdiction of the District Court to adjudicate. Alternatively, the matter should be remanded for new trial for the admission of improper evidence into the record.

DATED THIS 26 day of March, 2014.

STEVEN A. WUTHRICH

CERTIFICATE OF MAILING

I certify that on the 26th day of March, 2014, I mailed, via U.S. Mail, postage prepaid, a true and correct copy of the foregoing Brief to the following:

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